IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. _____

77-148

ROGER A. BRITT, et al.,

Petitioners,

vs.

SAN DIEGO UNIFIED PORT DISTRICT, and SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SAN DIEGO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

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Petitioners Roger A. Britt, et al., (hereafter Homeowners) respectfully pray that a writ of certiorari issue to review the decision of the California Court of Appeal, Fourth Appellate District, Division One, in the case at bench and, upon such review, a decision issue which makes it clear that "federal pre-emption" of airspace management does not bar state court suits for damages by neighbors of airports against airport operators.

Opinion Below

The opinion of the California Court of Appeal presented for review by this petition is reported as San Diego Unified Port Dist. v. Superior Court (1977) 67 Cal.App.3d 361, 136 Cal.Rptr. 557. A copy of the opinion is attached hereto as an Appendix.

Jurisdiction

The judgment of the California Court of Appeal sought to be reviewed was filed and entered on February 18, 1977. A timely Petition for Rehearing was denied by that Court on March 15, 1977. A timely Petition for Hearing in the California Supreme Court was denied (after the Court extended its time to consider the Petition) on April 28, 1977.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

Questions Presented for Review

1. Assuming arguendo that Congress intended to preempt local regulation of commercial aviation, does the "saving clause" contained in 49 U.S.C. § 1506

permit private citizens to maintain common law tort actions in state courts for the adverse consequences of the regulated activity?

2. In light of the consistent - and recent - expressions by the FAA as well as the Federal judiciary, that airport operators have power to control the use of their airports in order to prevent the infliction of jet noise injuries on neighboring people and properties, is it contrary to Federal law for a state court to deprive airport neighbors of the right to sue an airport on common law tort causes of action on the ground that

- local regulation is prohibited;
- an award of damages is the same as regulation;
- therefore an award of damages is prohibited?

3. Are damage actions brought due to jet aircraft noise around airports (where the aircraft, operating conditions, geographical conditions, etc. are different for each airport) on tort theories based on failure of the airport operator to

take steps to protect airport neighbors from the noise, more appropriately brought against the individual airport operators (who each have the authority to determine where the airport is located and what kind of aircraft are permitted to use it) in state courts, rather than against the United States (on the theory that the entire field has been "federally pre-empted" and any fault therefore resides in the United States) in U.S. District Courts?

Constitutional, Statutory and Regulatory Provisions

The following constitutional, statutory and regulatory provisions are involved in this Petition. Each is reproduced in full in Appendix "B" attached hereto:

United States Constitution, Article VI, Clause 2;

42 U.S.C. § 1857h-2(e);

49 U.S.C. § 1506;

14 C.F.R. § 36.5.

STATEMENT OF THE CASE

This is an action brought by more than 260 families (more than 900 people) to recover damages from the San Diego Unified Port District (the operator of Lindbergh Field in San Diego, California) for damage to person and property caused by the noise, fumes, smoke and vibrations created by jet aircraft operating to and from Lindbergh Field.

The Homeowners seek damages to their property and their person on the following legal theories:

- inverse condemnation;
- nuisance;
- negligence;
- trespass;
- operating without a valid permit from the California Department of Aeronautics;
- breach of grant agreements with the FAA which require protection of the interests of airport neighbors as a

pre-condition to obtaining Federal funds (see City of Inglewood v. City of Los Angeles [9th Cir. 1971] 451 F.2d 948).

The Port District demurred to the counts sounding in nuisance, negligence, trespass, and operating without a valid state airport permit. The ground of the demurrer was that "federal pre-emption" somehow immunized the Port District from the consequences of any of its actions.

The Superior Court overruled the demurrer.

Thereafter, the Port District sought an extraordinary writ, commanding the Superior Court to sustain the demurrers.

Although the Court of Appeal purported to deny the issuance of a peremptory writ (67 Cal.App.3d at 378), it instructed the trial court not to permit the recovery of any tort damages based on noise, fumes, vibrations and soot created by aircraft in flight. That instruction is legally erroneous (as discussed hereafter) and is tantamount to the issuance of a writ.

In a capsule, the Court of Appeal held:

- the Federal government has preempted all control of aircraft; and
- as a consequence, the Port District (as airport operator) has no control over aircraft; and therefore,
- since the Port District cannot control the source of the noise (i.e., the aircraft), it cannot be liable in tort for the noise produced by aircraft beyond the Port District's control.

This holding is contrary to Federal statutory and case law, as well as the most recent expressions of the FAA as to the power of local airport operators to control aircraft which use their facilities.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

First. Assuming, arguendo, that the Federal Government has preempted the regulation of aircraft in flight, Congress EXPRESSLY stated that common law suits for damages are permitted.

The Homeowners have not asked the Superior Court to issue any orders to the Port District to control its method of operations. While such action might be appropriate, all that is sought is money damages. Nonetheless, the Court of Appeal concluded that:

- local regulation is prohibited;
- an award of damages is the same as regulation;
- therefore an award of damages is prohibited.

The Court of Appeal is wrong.

When Congress passed the Federal Aviation Act (49 U.S.C. § 1301 et seq.), it included the following (49 U.S.C. § 1506):

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

Thus, even if Congress intended to preempt regulation, it also intended to permit actions for damages for the adverse consequences of the regulated activity.

Second. The Federal Government did NOT intend to completely preempt the field of aircraft regulation so as to prevent airport proprietors from controlling the noise nuisances created by aircraft using their facilities.

The United States government has repeatedly taken the position that the proprietor of an airport - such as the Port District at bench - has the power to regulate the use of its airport in order to protect its neighbors from jet aircraft nuisances. Indeed, the airport proprietor has the ultimate control: the power to decide whether specific types of

aircraft may operate from its airport (see 14 C.F.R. § 36.5).

The most recent expression of this position was on November 18, 1976, in a document issued by the Federal Aviation Administration, entitled Aviation Noise Abatement Policy. There, the FAA states:

> "Our concept of the legal framework underlying this policy statement is that proprietors retain the flexibility to impose such restrictions if they do not violate any Constitutional proscription. We have been urged to undertake - and have considered carefully and rejected - full and complete federal preemption of the field of aviation noise abatement. In our judgment the control and reduction of airport noise must remain a shared responsibility among airport proprietors, users, and governments." (p. 34; emphasis added.)

> "The primary obligation to address the airport noise problem always has been and remains a local responsibility." (p. 2)

Thus, in light of the FAA's recent, explicit comment that it has ". . . considered carefully and rejected - full and complete federal preemption of the field of aviation noise abatement . . .", it is hard to understand how the Court of Appeal could characterize as "correct" (67 Cal.App.3d at 369) the conclusion that:

> ". . . federal preemption of the field of airport noise regulation leaves no room for local controls -- including civil tort actions for money damages." (67 Cal.App.3d at 368)

Third. The decision conflicts with earlier decisions of federal courts on an issue of federal law.

Federal courts have recently and repeatedly held that an airport operator has power to regulate aircraft to

control noise (Air Transport Assn. v. Crotti [N.D. Cal. 1975] 389 F.Supp. 58, 63-64 [three judge District Court]; National Aviation v. City of Hayward [N.D. Cal. 1976] 418 F.Supp. 417, 424; British Airways Board and Compagnie Nationale Air France v. Port Authority of New York & New Jersey [2d Cir. 1977] Docket no. 77-7237).

The Court of Appeal expressly chose to disregard these holdings of Federal courts on issues of Federal law (67 Cal. App.3d at 368, 374).[1/]

Finally. The decision of the Court of Appeal conflicts with the clear policy of this Court that the airport operator is responsible for injuries inflicted on airport neighbors by airport users.

2/ Air Transport and National Aviation were expressly considered and disregarded by the Court of Appeal. British Airways Board, the most recent expression of this rule by a Federal Court, was decided after the Court of Appeal's decision herein.

This policy was announced in 1962 in Griggs v. Allegheny County (1962) 369 U.S. 84. The Court made it plain that since it is the individual airport operator that decides where its airport is to be located, how much land is to be acquired for buffer zones and what type of aircraft service is desired, the airport operator is liable for injuries inflicted on neighbors. This Court had before it in Griggs all potentially liable defendants, the airport operator, the airlines and the United States. This Court held that liability for damages caused by aircraft flight rested with the airport operator.

FEDERAL STATUTES EXPRESSLY AUTHORIZE THE TYPE OF COMMON LAW ACTIONS FORECLOSED BY THE COURT OF APPEAL

The Court of Appeal's conclusion that tort actions for damages are somehow "federally pre-empted" is puzzling. It is all the more so when the argument is viewed in light of the very statutes to which the Port District and the Court of Appeal attribute this "pre-emptive" effect.

A study of these statutes is fundamental to determine congressional intent. This Court has repeatedly held that preemption rests on Congressional intent to preempt. For example, in Schwartz v. Texas (1952) 344 U.S. 199, 202, 203, the Court stated:

> "If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the

state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

> "The principle thus applicable has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State. [citations]" (Emphasis added.)

Well, then, what's the situation at bench? Did Congress intend a total preemption? Or, was its goal more limited?

Congress has enacted four groups of statutes regulating the field of aviation. Each of them permits damage actions.

The Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 is the most pervasive.

It occupies chapter 20 of Title 49 of the United States Code, and governs the CAB as well as the FAA, and economic as well as safety and noise regulation of civil aviation.

Notwithstanding this extensive regulation, 49 U.S.C. § 1506 expressly permits common law suits such as those at bench:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

The Airport and Airway Development Act of 1970 (49 U.S.C. §§ 1701-1742) has been held expressly enforceable by airport neighbors in suits against airport operators. City of Inglewood v. City of Los Angeles (9th Cir. 1971) 451 F.2d 948, 955-956.

The Clean Air Amendments of 1970, 42 U.S.C. § 1857 et seq., also expressly permits suits by private citizens, in § 1857h-2(e):

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."

The Noise Control Act of 1972, 49 U.S.C. § 1431, is codified as part of chapter 20 of Title 49 U.S.C. It is thus subject to 49 U.S.C. § 1506 quoted above.

Indeed, this Court recently confirmed the propriety of private, common law actions in areas subject to exclusive federal (CAB) regulation. See Nader v. Allegheny Airlines, Inc. (1976) 426 U.S. 290, 298-300.

Thus, assuming arguendo that Congress had an intent that local regulation be "pre-empted", private actions for damages are permitted for any adverse consequences of the regulated activity.

This Court recently dealt with a similar problem (also arising in California)

under the National Labor Relations Act. In Farmer v. United Brotherhood of Carpenters (1977) ___ U.S. ___, 51 L.Ed.2d 338, this Court vacated the judgment of a California Court of Appeal and held that the National Labor Relations Act did not preempt the right of a union member to sue a union for tort in state court. In upholding the individual's right to maintain common law, state court suits in a Federally regulated area, this Court emphasized the state's interest in protecting its citizens from tortious injury, and the concurrent lack of Federal interest in protecting tortious conduct (___ U.S. at ___, 51 L.Ed.2d at 349-352).

The same is true here. California has a legitimate interest in protecting its citizens from tortious injury inflicted by jet noise. Likewise, though Congress has sought to foster aviation, it does not condone nor require operation of jet aircraft in such a manner or location that injury is inflicted on airport neighbors. Quite the contrary. As discussed hereafter, the position of the Federal government has been consistent and clear: it is the responsibility of

each airport operator to ensure that its airport is operated under such regulations as will avoid injury to nearby people and property - even if that means excluding noisy aircraft.

As this Court expressed it in Florida Lime and Avocado Growers, Inc. v. Paul (1963) 373 U.S. 132, 146-147:

> ". . . we are not to conclude that Congress legislated the ouster of this California statute by the marketing orders in the absence of an unambiguous congressional mandate to that effect. We search in vain for such a mandate."

The same is true in the case at bench. One would indeed ". . . search in vain for . . . a mandate" that common law tort actions are barred by "federal pre-emption". The search would be as futile as Ponce de Leon's quest for the "fountain of youth", because Congress expressly said the contrary: common law actions are permitted.

THE FEDERAL GOVERNMENT HAS EXPRESSLY REJECTED THE COURT OF APPEAL'S IDEA THAT, ". . . FEDERAL PREEMPTION OF THE FIELD OF AIRPORT NOISE REGULATION LEAVES NO ROOM FOR LOCAL CONTROLS . . ." (67 Cal.App.3d at 368)

The Court of Appeal's conclusion that the FAA has preemptive power to issue regulations to control jet noise is expressly disavowed by the FAA itself. In fact, the FAA says that significant authority and responsibility properly and necessarily remain with the airport operator. Since preemption cannot exist without an intent to preempt, the FAA's views are important. (See San Diego Bldg. Trades Council v. Garmon [1959] 359 U.S. 236, 243, 247.)

The views of the Federal government are most recently expressed in a document issued by the FAA on November 18, 1976, entitled Aviation Noise Abatement Policy.

The Aviation Noise Abatement Policy makes it clear that the FAA does not believe it has the preemptive power attributed to it by the Court of Appeal,

or that the State of California (operating through the Port District) is impotent to issue regulations to control jet noise for the protection of Californians. The following passages from the FAA policy statement are revealing:

> "Our concept of the legal framework underlying this policy statement is that proprietors retain the flexibility to impose such restrictions if they do not violate any Constitutional proscription. We have been urged to undertake - and have considered carefully and rejected - full and complete federal preemption of the field of aviation noise abatement. In our judgment the control and reduction of airport noise must remain a shared responsibility among airport proprietors, users, and governments." (p. 34, emphasis added.)

> "The primary obligation to address the airport noise problem always has been and remains a local responsibility." (p. 2)

Thus, in light of the FAA's recent, explicit comment that it has ". . . considered carefully and rejected - full and complete federal preemption of the field of aviation noise abatement . . ." (Policy Statement, p. 34), it causes wonder as to how the Court of Appeal could characterize as "correct" (67 Cal.App.3d at 369) the conclusion that:

> ". . . federal preemption of the field of airport noise regulation leave no room for local controls -- including civil tort actions for money damages." (67 Cal.App.3d at 368)

There are sound policy reasons for the FAA's rejection of total preemption. These are discussed in the FAA policy statement (p. 50):

> "The Airport Proprietor's Responsibility
>
> "Substantial benefits will be achieved through federal actions to abate source noise and control operational flight procedure and airspace, but much of the noise

> problem is airport-specific and must be addressed by individual proprietors. Noise impact at any airport is in part due to local decisions on airport location, continuation of airport operations on a particular site, the layout and size of an airport and the purchase of buffer areas for noise abatement purposes. It is local decision-making that permits residential development near an airport. For these reasons, the Supreme Court concluded that proprietors are liable for aircraft noise damages. In addition, airport proprietors, particularly those that are public agencies, generally encourage more service to their airports in Civil Aeronautics Board route proceedings.
>
> * * *
>
> "The airport proprietor is closest to the noise problem, with the best understanding of both conditions, needs and desires, and

> the requirements of the air carriers and others that use his airport. The proprietor must weigh the costs the airport and the community must pay for failure to act, and consider those costs against any economic penalties that may result from a decision to limit the use of the airport through curfews or other restrictions for noise abatement purposes." (Emphasis added.)

The injuries alleged in the complaint (though obviously caused by noise emitted [in part] by jet aircraft in flight) are the result of the failure by the Port District to face its responsibilities. While the FAA retains control of aircraft in flight, the injuries inflicted on the Homeowners are the result of what the FAA referred to as "airport-specific" problems. In fact, the "airport-specific" problems noted above by the FAA are all involved at bench.

- curfew;
- airport location;

- continuation of airport operations on a particular site;
- the layout and size of the airport; and
- the [non-] purchase of buffer areas.

If - as the FAA concludes - the Port District has the power to act, why should the Court of Appeal immunize the Port District from the consequences of its failure to act?

The consequences of permitting the precedent to stand will be widespread. Airport neighbors, seeking recompense for airport noise damage, will go to the Federal courts - as they will be the only courts which can give damages for injury to person as well as property. There are thousands of such cases pending in California courts now. And others across the Nation. Their shift to Federal courts will not serve the ends of justice. The financial consequences for airport operators' mismanagement of their airports will fall on the United States. It hardly seems to require argument to point out

the psychological effect on airport operators if the financial consequence of their indifference to airport noise is borne by someone else. Too little attention is already paid to the plight of airport neighbors under the existing liability burden.

The kind of control which the FAA believes that airport proprietors have is likewise revealing:

> "Airport Proprietors are primarily responsible for planning and implementing action designed to reduce the effect of noise on residents of the surrounding area. Such actions include optimal site location, improvements in airport design, noise abatement ground procedures, land acquisition, and restrictions on airport use that do not unjustly discriminate against any user, impede the federal interest in safety and management of the air navigation system, or unreasonably interfere with interstate or foreign commerce." (Policy Statement, p. 5; emphasis added.)

This conclusion conforms to the FAA's rejection of total federal preemption. Note particularly that airport operators may restrict airport use even though the restrictions may discriminate against some airport users and interfere with interstate and foreign commerce, so long as the discrimination is not "unjust", and the interference with commerce is not "unreasonable".

Thus, contrary to the Court of Appeal's conclusion, the FAA believes that ". . . the reasonableness of the operation of airports . . ." (67 Cal.App.3d at 369) is subject to examination. How else could one determine whether discrimination is "unjust", or interference with commerce is "unreasonable"?

In its most recent policy statement, the FAA has forcefully and repeatedly told airport operators, like the Port District, that they not only have the power to so act, but they must exercise that power. (See Policy Statement, pp. 5, 33, 34, 50, 47.)

In short, the very federal agency for which the Court of Appeal says Congress

preempted the field, has expressly concluded that:

1. Congress did no such thing; and
2. neither Congress nor the courts should do so; because
3. "The primary obligation to address the airport noise problem always has been and remains a local responsibility." (Policy Statement, p. 2)

"Our concept of the legal framework underlying this policy statement is that proprietors retain the flexibility to impose such restrictions if they do not violate any Constitutional proscription. We have been urged to undertake - and have considered carefully and rejected - full and complete federal preemption of the field of aviation noise abatement. In our judgment the control and reduction of airport noise must remain a shared responsibility among airport

proprietors, users, and governments." (Policy Statement, p. 34; emphasis added.)

3

THE COURT OF APPEAL MISREADS FEDERAL AUTHORITY AND ERRONEOUSLY CONCLUDES THAT THE PORT DISTRICT (AS AIRPORT OPERATOR) HAS NO POWER TO CONTROL THE NOXIOUS BY-PRODUCTS OF THE JET AGE EMITTED BY THE PORT DISTRICT'S TENANTS

The Court of Appeal adopted the Port District's fervent argument that this Court, in City of Burbank v. Lockheed Air Terminal (1973) 411 U.S. 624, held that airport operators can exert no control over jet noise.

This Court held no such thing.

In Burbank, the municipality which sought to regulate the airport was not the airport operator. All that was decided in Burbank was that municipalities cannot use their police powers to regulate airports which they do not operate. The power of an airport operator - as

landlord[2/] - to control what goes on at its own airport was expressly not decided:

> ". . . But, we are concerned here not with an ordinance imposed by the City of Burbank as 'proprietor' of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor." (City of Burbank v. Lockheed Air Terminal [1973] 411 U.S. 624, 636, fn. 14.)

2/ The conventional tool airport proprietors use to control noise is their lease to the airline users. By agreement, the airline is limited as to hours, class of aircraft, number of flights, etc.

The problem with the Court of Appeal's analysis in this case, is that it confuses two separate (but peacefully co-existing) lines of federal authority. One line deals with the power of airport proprietors. The other deals with the power (or more properly, lack of power) of local governments in or near which airports are located, but which are not the airport proprietor.

Burbank is simply the latest in a line of cases initiated by the Cedarhurst, Hempstead and Audubon Park litigation,[3/] in which the courts have consistently held that a government agency other than the airport operator has no power to

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3/ Allegheny Airlines v. Village of Cedarhurst (E.D.N.Y. 1955) 132 F. Supp. 871, aff'd (2d Cir. 1956) 238 F.2d 812; American Airlines, Inc. v. Town of Hempstead (E.D.N.Y. 1967) 272 F. Supp. 226, aff'd (2d Cir. 1968) 398 F.2d 369; American Airlines, Inc. v. City of Audubon Park (W.D. Ky. 1968) 297 F. Supp. 207, aff'd (6th Cir. 1969) 407 F.2d 1306.

issue regulations dealing with aircraft noise.

On the other hand, no court - before the opinion brought to this Court for review - has ever held that an airport operator itself lacked the power to so regulate. Quite the contrary. See, e.g., Port of New York Authority v. Eastern Airlines, Inc. (E.D.N.Y. 1966) 259 F. Supp. 745; Burbank, supra, 411 U.S. at 636, fn. 14; National Aviation v. City of Hayward (N.D. Cal. 1976) 418 F. Supp. 417; Air Transport Assn. v. Crotti (N.D. Cal. 1975) 389 F. Supp. 58, 63-64 (three judge District Court); British Airways Board and Compagnie Nationale Air France v. Port Authority of New York & New Jersey (2d Cir. 1977) Docket No. 77-7237.

This consistent position of the Federal judiciary was perhaps best summed up by the three judge District Court in Crotti, supra, 389 F. Supp. at 63-64:

> "It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport; his right to

> control the use of the airport is a necessary concomitant, whether it be directed by state police power or his own initiative. . . . That correlating right of proprietorship control is recognized and exempted from judicially declared preemption by footnote 14." (Emphasis added; footnote omitted.)

The most recent expression occurred in the Concorde case (British Airways Board, supra), where the Court of Appeals rejected the notion that the Port Authority of New York and New Jersey lacked the power to establish the conditions and regulations under which the Concorde might be allowed to use its airport facilities:

> "We need not tarry long over the issue that heretofore has occupied center stage in this litigation. We believe the grounds for Judge Pollack's grant of summary judgment, that Secretary Coleman's order preempted the conflicting exercise

of power by the Port Authority, is simply untenable and erroneous. Accordingly, we will reverse.

"In response to our request, the United States filed an amicus brief in which it urged that Secretary Coleman's order was never intended to deprive the Port Authority of the right to condition utilization of the facilities at JFK on the Concorde's compliance with reasonable noise regulations. The Government, indeed, went further, and denied that existing legislation authorized the Executive under any circumstances to preempt airport proprietors from promulgating their own noise regulations.

"This conclusive statement of the United States position confirms our independent assessment of the public record." (slip opinion, p. 12; emphasis added.)

Neither Congress nor the Federal judiciary intended to bar airport owner-operators from regulating their own airports.

Quite the contrary.

The Port District's misreading of the federal authorities has caused much grief for the neighbors of Lindbergh Field, as the Port District has for many years refused to take action to protect them. If the Port District's lawyers have told their client what they tell the courts, it then becomes understandable why the Port District has seemed so arrogant in its indifference to its neighbors' plight.

Sadly, the Court of Appeal has now put into mischief-making precedent this erroneous, self-abnegating reasoning.

It is time the Port District ceased its self-imposed regulatory celibacy and acted to abate the problems. That would be a constuctive way to rid itself of the prospect of litigation such as this, rather than putting its resources toward efforts to muddy the law, such as the one presented to this Court.

CONCLUSION

With respect, the premise of the Court of Appeal (i.e. that awarding damages is tantamount to regulation, and regulation is "federally preempted") is doubly flawed:

> first, as the FAA recently noted, the field of regulation is not preempted; and
>
> second, regardless of regulatory preemption, Congress expressed its intent that common law actions be allowed to proceed.

WHEREFORE, the Homeowners pray that a writ of certiorari issue, so that all are made aware of who is responsible for evolving a solution to jet noise problems.

Respectfully submitted,

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By: MICHAEL M. BERGER

Attorneys for Petitioners

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA

4 Civ. No. 16142

(Sup. Ct. No. 367963)

THE SAN DIEGO UNIFIED PORT DISTRICT, et al,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,

Respondent.

ROGER A. BRITT, et al,
and
EVERETT SINCLAIR BANKS, et al.

Real Parties in Interest.

PROCEEDING in prohibition/mandate. Order to show cause discharged. Petition for peremptory writ denied.

Luce, Forward, Hamilton & Scripps, by Louis E. Goebel, Michael S. Gatzke, Ronald W. Rouse and Walter J. Cummings, III, for Petitioners.

No appearance for Respondent.

Fadem, Berger, McIntire & Norton, by Michael M. Berger and Patsy Mumiston Car Carter, for Real Parties in Interest.

INTRODUCTION

A group of homeowner-plaintiffs (Britt)[1] is seeking damages on various theories from the San Diego Unified Port District (Port District), the operator is San Diego International Airport (Lindbergh Field). Before this Court, the parties are engaged in two theaters of litigation. This proceeding (4 Civ. No. 16142) is a challenge to an order overruling a general demurrer to causes of action in nuisance, negligence, trespass and failure to obtain a state operating permit. The other proceeding (4 Civ. No.

FOOTNOTE 1: Plaintiffs are 936 individuals and one church. They brought two actions, Britt, et al, v. San Diego Unified Port Dist., San Diego Superior Court No. 367963, and Banks, et al, v. San Diego Unified Port Dist., San Diego Superior Court No. 379755, which were consolidated by the superior court.

16053), retransferred to this Court by the Supreme Court for hearing, challenges on First Amendment grounds the denial of an order protecting Britt from discovery. Except for the possibility the sustaining of demurrers to the tort causes of action might render moot the discovery question, the two proceedings are unrelated.

THE ACTION

Plaintiffs allege in Count 1 the operation of Lindbergh Field by the Port District has so interfered with their ownership rights as to constitute a taking of their property for public use within the meaning of the Federal and State Constitutions. They claim such interference, usually referred to as inverse condemnation, entitles them to just compensation. The Port District does not contest the overruling of its demurrer to this count, accepting for the purposes of these proceedings that if a taking has occurred the Port District is the

responsible entity.[2]

In addition, plaintiffs seek recovery for both property damage and personal injury on theories of nuisance (Counts 3 and 4), negligence (Counts 5 and 6), trespass (Counts 7 and 8), and failure of the Port District to obtain a proper state operating permit (Counts 9 and 10). The respondent court overruled a general demurrer to these Counts (3 through 10) and it is that action which is contested in this petition by the Port District. Other remaining Counts (13 and 14), for breach of contractual obligations to a third party beneficiary under contracts between the Port District and the FAA, are not at issue.

ISSUE

The issue presented is whether federal law in the field of aircraft noise regulation preempts all state and local

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FOOTNOTE 2: See Griggs v. County of Alle Allegheny, Pennsylvania, 369 U.S. 34 [82 S. Ct. 531]. But see Note, "Shifting Aircraft Noise Liability to the Federal Government," 61 Va. L. Rev. 1299.

controls and therefore precludes civil actions against airport operators based upon common law or statutory causes of action.

DISCUSSION

A. Propriety of reviewing the question on petition for prerogative writ.

Only with "extreme reluctance" are prerogative writs employed to afford intermediate review of rulings on pleadings (Babb v. Superior Court, 3 Cal.3d 841, 851).

> "'In most . . . cases, as is true of most other interim orders, the parties must be relegated to a review of the order on appeal from the final judgment.'" (Id., quoting Oceanside Union School Dist. v. Superior Court, 58 Cal.2d 180, 185, fn. 4.)

Nevertheless, in circumstances of a "grave" nature" or of "significant legal impact," appellate courts may be compelled to intervene through the issuance of an extraordinary writ (Babb v. Superior Court, supra, 3 Cal.3d 841, 851).

The issue presented is a significant question of law. If the respondent court erroneously permitted tort causes of

action to be pursued, substantial discovery and trial expenses are needlessly imposed on the Port District (directly) and the public (indirectly). The difference between the action as it stands, requiring discovery of the medical histories of hundreds of individual plaintiffs, and the action as the Port District contends it should stand, requiring "merely" appraisal of about 200 parcels of property, is spacious. In the memorandum of points and authorities in opposition to the petition, Britt argues only that the respondent court correctly decided the issue on its merits and nowhere suggests review should be deferred until appeal from judgment.[3] For these reasons our intervention by issuance of an order to show cause was justified.

B. Merits.

1. Contentions.

The Port District summarizes its argument as follows:

FOOTNOTE 3: See 5 Witkin, Cal. Proc.2d (1971), Extraordinary Writs, §43, p. 3817.

"1. Federal legislation and authorized agency regulation in the field of aircraft and airport noise is so pervasive that it has preempted all state and local controls. City of Burbank v. Lockheed Air Terminal (1973) 411 U.S. 624, 638, 93 S.Ct. 1854 . . . . The multitude of interrelated considerations in this field permits only a uniform and exclusive system of Federal regulation. Id., 411 U.S. at 639.

"2. This preemption precludes not only local regulation by legislative action, but regulation by local judicial action as well. E.g., Luedtke v. County of Milwaukee, 371 F.Supp. 1040, 1044 (E.D. Wis. 1974), aff'd, 521 F.2d 387, 390-391.

"3. The tort counts (Counts 3-10) of plaintiffs' complaint require adjudication of the 'reasonableness' of conduct in the operation of Lindbergh Field. These counts require the respondent Court to adjudicate questions of whether or not noise impact on plaintiffs resulting from jet aircraft operations at Lindbergh Field, if any, could be reduced by changes in specific opertional procedures.

"4. The awarding of money damages is every bit as much a regulation of conduct by a court as the exercise of its equitable jurisdiction to regulate by injunction. E.g.,

San Diego Bldg. Trades Council v. Garmon (1959) 359 U.S. 236, 246-247, 79 S.Ct. 773. . . . Indeed, plaintiffs' request for money damages under the tort counts is merely a back door approach to placing airport operational procedures under judicial direction.

"5. The inverse condemnation count is not directly affected by this federal preemption because:

"a. If there is judicial determination that the level of interference with plaintiffs' properties is sufficiently great to constiture a 'taking' under the Fifth and Fourteenth Amendments, (United States v. Causby (1945) 328 U.S. 256, 66 S.Ct. 1062 . . .) they are entitled to 'just compensation' because Congressional or agency action may not operate to deprive citizens of constitutional rights; and,

"b. Inverse condemnation as a legal theory of recovery does not require adjudication of the conduct of airport operational procedures. Essentially, it only requires findings of a substantial interference with private property for public purposes and a diminution in the market value of the property."

Britt responds in essence the duty of an airport proprietor, as land occupier,

to operate airport facilities nontortiously is unaffected by cases recognizing federal preemption in the field of noise regulation. Distinction is drawn between the exercise of police power by a municipality to control airport noise and the exercise of proprietary power by the owner-operator of an airport.

2. Discussion.

a. Federal Law.

The seminal case in the area of federal preemption of airport noise regulation is City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 [93 S.Ct. 1854]. Both parties rely on this case in support of their positions and claim it disposes of the issue at bar.

In Burbank the owner-operator of the Hollywood-Burbank Airport brought suit in federal court against the City of Burbank to enjoin enforcement of a city ordinance forbidding any pure jet aircraft from taking off from the airport getween 11 p.m. of one day and 7 a.m. of the next, and forbidding the airport operator from permitting any such takeoffs. The District

Court enjoined enforcement of the ordinance, and the Court of Appeals for the Ninth Circuit affirmed. In a five-to-four decision, the United States Supreme Court affirmed, holding "FAA, now in conjunction with EPA, has full control over aircraft noise, pre-empting state and local control." (Id. p. 633 [93 S.Ct. p. 1859].)

The United States Supreme Court expressly left open what limits, if any, apply to the exercise of proprietary rights by a municipality which owns and operates an airport. In a controversial footnote the Court explained:

"The letter from the Secretary of Transportation also expressed the view that 'the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.' (Emphasis added.) This portion as well was quoted with approval in the Senate Report. Ibid.

"Appellants and the Solicitor General submit that this indicates that a municipality with jurisdiction over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility in the area. But, we are concerned here not with an ordinance imposed by the City of Burbank as 'proprietor' of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor." (Id. p. 635, fn. 14 [93 S.Ct. p. 1861, fn. 14].)

Britt contends the Court in Burbank expressly "acknowledged that the operator of an airport does have the power to issue regulations." Since this is so, the conduct of the Port District as operator of Lindbergh Field is not shielded by federal preemption; its alleged impotence to impose reasonable noise controls is illusory, and it should be held responsible for its tortious conduct. Such an interpretation of footnote 14 ignores the rationale of the text of the opinion.

A majority of the Supreme Court reasoned in Burbank the interdependence of such concerns as safety, efficiency and noise control "requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." (Id. pp. 638-639 [93 S.Ct. p. 1862].) If a curfew interferes with this perceived requirement of uniformity, it should make no difference whether the curfew is imposed on the authority of local police power or the owner's proprietary power. The impact of the curfew remains the same -- interference with flight schedules at other airports and local flight congestion immediately before and after the hours of curfew.

Britt thus offers an anomaly: a municipality or governmental agency may impose noise regulations in its capacity as airport proprietor which it could not impose under its police power. Even though the District Court for the Northern District of California has very recently reached such a conclusion in

National Aviation v. City of Hayward, Cal. 418 F.Supp. 417, we doubt the Supreme Court intended such a result.

The Burbank Court acknowledged "the Hollywood-Burbank Airport may be the only major airport which is privately owned." (City of Burbank v. Lockheed Air Terminal Inc., supra, 411 U.S. 624, 635, fn. 14 [93 S.Ct. 1854, 1861, fn. 14].) The vast majority of national airports are operated by municipalities or governmental entities such as the Port District. If the limitation of footnote 14 is construed as Britt suggests, local regulation by municipal airport "proprietors" would not be preempted by federal law, and "Burbank becomes a decision of nearly unique application" (Warren, "Airport Noise Regulation: Burbank, Aaron, and Air Transport," 5 Environmental Affairs 97, 106, fn. 56). "If the great bulk of airport noise cases are not to be affected. . . . the rationale of Burbank is defeated" (Id. p. 106).

The Port District focuses on the reasoning of the Burbank case. Counsel contends federal preemption of the field of

airport noise regulation leaves no room for local controls -- including civil tort actions for money damages. Relying primarily upon San Diego Building Trades Council, etc., v. Garmon, 359 U.S. 236 [79 S.Ct. 773], the Port District urges the awarding of money damages is as much a regulation of conduct as an injunction or legislative activity. In San Diego Building Trades Council, the United States Supreme Court stated:

> "Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." (Id. pp. 246-247 [79 S.Ct. 780].)

The Port District urges if money damages were to be awarded in this action, it would be punished for conduct which is

essentially within federal jurisdiction. If juries in 50 states are permitted to assess the reasonableness of the operation of airports, it would be impossible to attain a national uniform scheme of airport noise regulation. This conclusion seems correct.

The Port District adamantly urges Luedtke v. County of Milwaukee, 521 F.2d 387, is indistinguishable from this action. In that post-Burbank case, property owners were suing the County of Milwaukee, as owner and operator of General Mitchell Field, the major Milwaukee airport, and five federally certified airlines which utilized the airport facilities. The plaintiffs charged that aircraft, in taking off and landing at Mitchell Field, flew over their property at low altitudes, causing noise, vibration, fumes and the dropping of dust and noxious substances on their property. The plaintiffs claimed the defendants deprived them of their property without just compensation in violation of the Constitution. In addition, they claimed the defendants created a nuisance in violation of state law.

> "As relief, the plaintiffs [sought] actual and punitive damages, a mandatory injunction directing the County to initiate condemnation proceedings against their property, and a promulgation, by the district court, of rules and regulations to govern the aircraft and airport operations at Mitchell Field." (Id. p. 389.)

The District Court granted defendant's motion to dismiss the complaint. On appeal the United States Court of Appeals for the Seventh Circuit acknowledged the right of the plaintiffs to seek inverse condemnation damages, but rejected their claims for injunctive relief and tort damages. The Court stated:

> "The district court properly held that relief in the form of judicially-made rules and regulations to govern the airport and airline operations at Mitchell Field was not available to the plaintiffs. In City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 93 S.Ct. 1854, 36 L. Ed.2d 547 (1973), the Supreme Court held that the Federal Aviation Administration (FAA), in conjunction with the Environmental Protection Agency (EPA), 'has full control over aircraft noise, pre-empting state and local control.' 411 U.S. at 633, 93 S.Ct. at 1859. '[T]he pervasive

> control vested in EPA and in FAA under the [Noise Control Act of 1972] leave[s] no room for local curfews or other local controls.' 411 U.S. at 638, 93 S.Ct. at 1862. The Court has similarly noted that in the area of aircraft emissions, Congress 'has also pre-empted the field.' Washington v. General Motors Corp., 406 U.S. 109, 114, 92 S.Ct. 1396, 31 L.Ed.2d 727 (1972). See Virginians for Dulles and Volpe 344 F.Supp. 573, 579 (E.D. Va. 1972). As the court below recognized, it is irrelevant that the plaintiffs here are asking a federal district court, rather than a state body, to promulgate the rules governing Mitchell Field. The rules and regulations which the plaintiffs seek would, nonetheless, result in the type of local control which the Supreme Court in Burbank found to be invalid.
>
> ". . . . . .
>
> "The remainder of the plaintiffs' claims charge both defendants with common law nuisance and negligence and violation of § 114.04 of the Wisconsin Statutes, which makes it unlawful, inter alia, for an aircraft to fly 'at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner.' These claims are apparently based on pendent jurisdiction. The district court held that even if it were to consider these allegations, see United

Mine Workers v. Gibbs, 383 U.S. 715, 725-726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), the plaintiffs' action on these counts could not be maintained. We agree.

"Since the federal laws and regulations have preempted local control of aircraft flights, Burbank, supra, the defendants may not, to the extent they comply with such federal laws and regulations, be charged with negligence or creating a nuisance. Similarly, § 114.04 of the Wisconsin Statutes cannot be invoked to make unlawful flights which are in accordance with federal laws and regulations. If, as the plaintiffs allege, the aircraft flights have resulted in the 'taking' of their property, the plaintiffs have actions at law to recover just compensation from the County. Griggs, supra; . . . . To the extent that the County may be violating the federal laws or regulations, the plaintiffs should, as explained. . . , exhaust their administrative remedies." Luedtke v. County of Milwaukee, 521 F.2d 387, 390-391.)

Since the tort causes of action were dismissed against the County of Milwaukee, as owner and operator of General Mitchell Field, as well as against the airline defendants, the case is factually on point. Britt's attempt to distinguish Luedtke is disingenuous.

The Port District correctly points out a decision of a lower federal court on a federal question, though not binding, is "persuasive and entitled to great weight" (People v. Bradley, 1 Cal. 3d 80, 86; see also 16 Cal.Jur.3d, Courts, §157, p. 288). The persuasiveness of the Luedtke decision is somewhat diminished, however, by the Court's use of the Burbank case to dismiss causes of action against two different types of defendants, the airport operator and the airlines, without distinction. In fact, the Burbank case involved an attempted exercise of police power by a nonproprietary city, and the Supreme Court expressly declined to consider what controls might be imposed by the owner-operator of an airport.

Two other recent federal decisions, Air Transport Association of America v. Crotti, 389 F.Supp. 58, and National Aviation v. City of Hayward, Cal., supra, 418 F.Supp. 417, bear on the issue of preemption. In Crotti an association of air carriers sued the managing officials of major California airports

seeking a declaratory judgment that state noise regulations adopted pursuant to the state Public Utilities Code were invalid. The challenged regulations were of two types: (1) Community Noise Equivalent Level (CNEL) standards, which prescribed for continued operation of airports with monitoring requirements aimed at achieving a future maximum noise level, and (2) Single Event Noise Exposure Level (SENEL) standards, which were prohibitions applied to the inseparable feature of noise generated by an aircraft engaged in flight.

The Association's position narrowed "to the simple contention that any control and regulation of the levels of noise generated by aircraft in direct flight is preempted by the federal government" (Air Transport Association of America v. Crotti, supra, 389 F.Supp. 58, 62), and the CNEL standards and related monitoring requirements and SNEL prohibitions were therefore void.

The District Court found this argument to be overbroad:

"We believe that the Airlines' total reliance upon Burbank is misplaced. The factual picture supporting Burbank is of narrow focus, a single police power ordinance of a municipality -- not an airport proprietor -- intending to abate aircraft noise by forbidding aircraft flight at certain night hours. The holding in Burbank is limited to that proscription as constituting an unlawful exercise of police power in a field pre-empted by the federal government, and we take as gospel the words in footnote 14 in Burbank: '[A]uthority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor.' (Emphasis supplied.)

> "It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport; his right to control the use of the airport is a necessary concomitant, whether it be directed by state police power or his own initiative." (Id. pp. 63-64.)

The Court then concluded the CNEL monitoring procedures, which were "a passive function" "innocuous to aircraft traffic" and not in direct conflict with federal regulations, were not affected by the Burbank case. The Court ruled.

> "The State dictated employment of shielding and ground level facility configurations, as well as development of compatible land uses under the provisions of CNEL, is so patently within local police power control and beyond the intent of Congress in the federal legislation that further discussion would be wasteful." (Id. p. 65.)

However the Court held:

> "The SENEL provisions and regulations are not so favored. We are satisfied and conclude that the SENEL provisions and regulations of noise levels which occur when an aircraft is in direct flight, and for the levying of criminal fines for violation, are a per se unlawful exercise of police power into the exclusive federal domain of control over aircraft flights and operation, and air space management and utilization in interstate and foreign commerce. The thrust of the Single Event Noise Exposure Levels is clear and direct and collides head-on with the federal regulatory scheme for aircraft flights delineated by and central to the Burbank decision." (Id. p. 65.)

This application of the "proprietor exception" of the Burbank case achieves some accomodation between state and federal interests. The Court focused

not on whether police or proprietary power was being exercised, but rather on the activity regulated. The CNEL regulations, which dealt with ground noise level management through land use planning, were not preempted; the SENEL regulations, which sanctioned the noise levels of aircraft themselves, were preempted. Airport land and facilities use (proprietary functions) were subject to local regulation, but noise emanating from aircraft in flight (federally regulated) was not.

In National Aviation v. City of Hayward, Cal., supra, 418 F.Supp. 417, four related commercial airlines sought to have a City of Hayward ordinance declared unconstitutional. The challenged ordinance, expressly enacted pursuant to the City's authority as owner, operator and proprietor of its local airport, prohibited all aircraft in excess of a fixed decibel level from landing or taking off from the Hayward Air Terminal between the hours of 11:00 p.m. and 7:00 a.m. The District Court defined its task at the outset:

> "[T]he Burbank court's finding of preemption was made only with regard to a nonproprietor municipality's attempt to regulate aircraft noise pursuant to its police power. Indeed, in footnote 14 of the majority opinion, Mr. Justice Douglas expressly acknowledges that the court 'do[es] not consider here what limits, if any, apply to a municipality as a proprietor.' 411 U.S. at 635-36 n. 14. As a result, this court must now attempt to do so." (Id. p. 421.)

There was no doubt if the ordinance had been passed by a local government not the proprietor of the airport, it would run afoul of Burbank and would constitute an impermissible exercise of police power in an area preempted by Congress.

The Court found itself

> " . . . caught on the horns of a particularly sharp dilemma: If on one hand, we follow the dicta in footnote 14 of the Burbank opinion, which is intended to comport with the court's holding in Griggs, we will severely undercut the rationale of Burbank's finding of preemption. If on the other hand, we disregard the proprietor exception as dicta in order to fully effecuate the Burbank rationale, we impose upon airport proprietors the responsibility under Griggs for obtaining the requisite noise easements, yet deny them the authority to control the level of

> noise produced at their airports." (Id. p. 424.)

The dilemma was resolved in favor of the ordinance for two reasons. First, the Court interpreted Air Transport Association of America v. Crotti, supra, 389 F. Supp. 58, 63-64, as holding "proprietorship control is recognized and exempted from judicially declared preemption by [Burbank's] footnote 14." The language quoted does not comport precisely either with footnote 14 or with what the court deciding Crotti, actually did. The Court in Burbank said merely: "We do not consider here what limits, if any, apply to a municipality as a proprietor." (Emphasis added.) That is a far cry from, "No limits apply to a municipality as a proprietor." Furthermore, both the CNEL and SENEL regulations considered in Crotti were exercises of state police power, rather than proprietary power. If the category of power exercised were dispositive, as the National Aviation court implies, both types of regulation should have fallen. Instead, the Crotti court focused on the nature of the regulation, i.e., land management v. air space

management.

The second basis for upholding the ordinance was the clear expression of Congressional intent not to "'prevent airport proprietors from excluding any aircraft on the basis of noise considerations.'" (National Aviation v. City of Hayward, Cal., supra, 418 F.Supp. 417, 424, quoting Sen. Rpt. No. 1353, 90th Cong., 2d Sess., 7.)

The result reached in National Aviation v. City of Hayward, Cal., supra, severely undercuts the Burbank decision. Five members of the Supreme Court found the Burbank ordinance incompatible with a perceived need for a uniform and exclusive system of federal aircraft noise regulation. The City of Hayward ordinance seems equally incompatible; yet it was permitted to stand as an exercise of proprietary power.

b. State Law.

Britt adduces several California cases in support of the respondent court's overruling of the demurrers. For diverse reasons, reliance upon these cases is misplaced.

In Loma Portal Civic Club v. American Airlines, Inc., 61 Cal.2d 582, Britt contends, the Supreme Court held that while airlines could not be prohibited from flying, damages could be sought from the airport's owner-operator on a nuisance theory.[4] Although the California Supreme Court did reject the airlines' claim of federal preemption, the short answer to Loma Portal, the Port District retorts, is that the case was decided nine years before Burbank. In rejecting federal preemption the California Court noted:

FOOTNOTE 4: In fact the holding was more narrow. The operator of the field was not a party to the action. The Court stated merely:

> "Nothing herein is intended to be a determination of the rights of landowners who suffer from airplane annoyances to seek damages from the owners or operators of aircraft or to seek compensation from the owner or operator of an airport." (Id. pp. 590-591.)

"A holding of federal preemption would have the effect of disabling the state from any action in the entire field, and placing in the federal government complete and sole responsibility for regulation of all aspects of that field. Such a holding by a single state court would have, of course, no effect on the conduct of other states with respect to regulation of that field, and unless Congress had in fact intended such preclusion of state regulation and were to carry out its responsibilities, there would result within that state a lacuna which the state would be powerless to fill. As was said in Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 505 [82 S. Ct. 519, 7 L.Ed.2d 483], quoting from the opinion of the Massachusetts Supreme Judicial Court: 'In the absence of a clear holding by the Supreme Court of the United States that Federal jurisdiction has been made exclusive, we shall not make what would be tantamount to an abdication of the hitherto undoubted jurisdiction of our own courts.'" (Loma Portal Civic Club v. American Airlines, Inc., 61 Cal.2d 582, 591.)

Nestle v. City of Santa Monica, 6 Cal. 3d 920, Britt notes, was a case brought by hundreds of individual plaintiffs against the City of Santa Monica as operator of the Santa Monica Airport. The plaintiffs were permitted to go

forward on four theories: inverse condemnation, nuisance, negligence and zoning violations. The Port District correctly responds (1) Nestle was decided approximately one year before Burbank, and (2) governmental immunity under state law, and not federal preemption, was at issue.

In City of San Jose v. Superior Court, 12 Cal.3d 447, Britt claims, the Supreme Court noted that a nuisance action can be maintained against a public airport. In fact, the Court nowhere addressed federal preemption in that case and was concerned solely with class action issues. Although San Jose was decided after Burbank, it cannot fairly be said to be, as Britt argues, the "current law of California" on issues not contested.

In Aaron v. City of Los Angeles, 40 Cal.App.3d 471, homeowner plaintiffs successfully sought inverse condemnation damages for harm caused by air traffic at Los Angeles International Airport. The court rejected the City's contention that federal preemption precluded local regulation of airport noise and absolved

the City of responsibility for the interference with plaintiffs' use and enjoyment of their property caused by air traffic. The court noted nothing in Burbank relieved airports of the duty to appropriate necessary land and air easements (id. p. 489; see Griggs v. County of Allegheny, Pennsylvania, supra, 369 U.S. 84 [82 S.Ct. 531]). The Port District accurately replies:

> "What is significant about Aaron is that the case was tried, and discussed on appeal, solely upon an inverse condemnation theory of recovery. The Court of Appeal, commencing at page 487 of its opinion, pointed out that Federal preemption would not obviate the responsibility of the airport operator to compensate private property owners (as required by the Constitution) for any taking of their property for airport operations, citing Griggs v. Allegheny County, supra. That is, of course, consistent with the position which has been taken by the Port District in this petition. Aaron did not discuss the effect of Federal preemption on tort theories of recovery requiring adjudication of airport operational procedures."

CONCLUSION

We conclude the plaintiffs may not recover tort damages from the Port District for harm caused by aircraft in flight. Of the federal decisions which have dealt with the authority of airport proprietors after Burbank, we accept the reasoning of the court in Air Transport Association of America v. Crotti, supra, 389 F. Supp. 58, which distinguished between airport land and facility use (held subject to local regulation) and aircraft in flight (held subject to federal regulation only). To authorize recovery from the proprietor of an airport for injuries caused by aircraft in flight would permit local liability for conduct within exclusive federal control.[5]

FOOTNOTE 5: "'Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.'" (City of Burbank v. Lockheed Air Terminal Inc., supra, 411 U.S.

(Continued)

It is no rebuttal to this reality to argue that the Port District could reduce or avoid its tort liability by selectively or entirely excluding aircraft from Lindbergh Field. Such regulations to avoid tort liability would have the same deleterious effect on interstate air traffic flow as the Burbank ordinance.[6] In our view, civil damages for

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FOOTNOTE 5 Continued:

624, 633-634 [93 S. Ct. 1854, 1860], quoting Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 [Jackson, J., concurring].)

FOOTNOTE 6: "If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the time of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded. In 1960 the FAA rejected a proposed restriction on jet operations at the Los Angeles airport between 10 p.m. and 7 a.m. because such restrictions could 'create critically serious problems to all air transportation patterns.' 25 Fed Reg 1764-1765. The complete FAA statement said:

(Continued)

the noxious by-products of aircraft in flight, like the Burbank ordinance and like the SENEL regulations invalidated

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FOOTNOTE 6 Continued:

> "'The proposed restriction on the use of the airport by jet aircraft between the hours of 10 p.m. and 7 a.m. under certain surface wind conditions has also been reevaluated and this provision has been omitted from the rule. The practice of prohibiting the use of various airports during certain specific hours could create critically serious problems to all air transportation patterns. The network of airports throughout the United States and the constant availability of these airports are essential to the maintenance of a sound air transportation system. The continuing growth of public acceptance of aviation as a major force in passenger transportation and the increasingly significant role of commercial aviation in the nation's economy are accomplishments which cannot be inhibited if the best interest of the public is to be served. It was concluded therefore that the extent of relief from the noise problem which this provision might have achieved would not have compensated the degree of restriction it would have imposed on domestic and foreign Air Commerce.'
>
> "This decision, announced in 1960, remains peculiarly within the

(Continued)

in Crotti, are a form of state regulation in an area which must remain free of such regulation if national air safety, traffic and noise policy are to be left unhampered.

Plaintiffs have not alleged that the flying aircraft about which they complain did not comply with federal laws and regulations. Since federal laws and regulations have preempted local control of aircraft in flight, flights which comply with such laws and regulations may not be classified as negligent, nuisances or trespasses, and the Port District cannot be held liable for tort damages alleged to arise from them. To the extent such

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FOOTNOTE 6 Continued:

> "This decision, announced in 1960, remains peculiarly within the competence of the FAA, supplemented now by the input of the EPA. We are not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it." (City of Burbank v. Lockheed Air Terminal Inc., supra, 411 U.S. 624, 639-640 [93 S. Ct. 1854, 1862-1863].)

flights may have resulted in the "taking" of their property, plaintiffs are relegated to a recovery of just compensation in inverse condemnation against the Port District (Luedtke v. County of Milwaukee, supra, 521 F.2d 387, 391; see also Griggs v. County of Allegheny, Pennsylvania, supra, 369 U.S. 84 [82 S. Ct. 531].)

However, nothing in the Burbank decision suggests an airport operator is relieved by federal law of the common law duty to act nontortiously as a proprietor. If the Port District has tortiously managed and maintained the facilities at Lindbergh Field to the harm of some or all of the plaintiffs, the action is not precluded by the doctrine of federal preemption.

Since the allegations in the complaint seek recovery for harm caused by proprietary actions and omissions as well as for harm caused by aircraft in flight, they are broad enough to state a cause of action, and the general demurrers at issue were properly overruled. Nevertheless, recovery for tort damages at trial should be limited to those

damages, if any, which arise out of the operation of the airport itself and should not include damages caused by aircraft in flight.

The order to show cause is discharged, and the petition for a peremptory writ is denied.

CERTIFIED FOR PUBLICATION.

Ault
J.

WE CONCUR;

Brown
P.J.

Cologne
J.

APPENDIX B

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

United States Constitution, Article VI, Clause 2:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

42 U.S.C. § 1857h-2(e):

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

49 U.S.C. § 1506:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

14 C.F.R. § 36.5:

> Pursuant to 49 U.S.C. 1421(b)(4), the noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. No determination is made, under this part, that these noise levels are or should be acceptable or unacceptable for operation at, into, or out of any airport.